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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 442

KENDRICK M. COLE, PETITIONER

v.

PHILIP YOUNG, CHAIRMAN, GEORGE M. MOORE, AND FREDERICK J. LAWTON, MEMBERS OF THE UNITED STATES CIVIL SERVICE COMMISSION, AND MARION B. FOLSOM, SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 45) is reported at 125 F. Supp. 284. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 55) is reported at 226 F. 2d 337.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1955 (R. 64). The petition

for a writ of certiorari was filed on October 3, 1955, and was granted on November 21, 1955 (R. 65). The jurisdiction of this Court rests upon 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the Act of August 26, 1950, Public Law 733, 81st Congress, which empowers the heads of specified departments and agencies to dismiss employees in the interests of the national security and also provides that "[t]he provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security," authorized the President to extend, by Executive Order 10450, the provisions of the Act to agencies such as the Department of Health, Education, and Welfare.

2. Whether, after finding that such action was "necessary in the best interests of national security," the President could validly implement Public Law 733 by directing, in Executive Order 10450, that department and agency heads be guided, in exercising the authority vested in them by that Act to dismiss employees whenever they determine such termination to be "necessary or advisable in the interest of the national security," by the principle that no person should be employed unless his employment is "clearly consistent with the interests of the national security."

3. Whether a department head's letter to an employee which refers to written charges previously brought against the employee, to the sections of Executive Order 10450 upon which the charges were based, and to the employee's refusal to answer such charges, and states that his employment is being terminated because it has been determined that his continued employment is not clearly consistent with the interests of national security, is a "written statement of the decision" of the department head within the meaning of Section 1 of Public Law 733.

STATUTES AND EXECUTIVE ORDER INVOLVED

P. L. 733, 81st Congress (Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1, *et seq.*), Executive Order 10450 (18 F. R. 2489), and Section 14 of the Veterans' Preference Act of 1944 (58 Stat. 387, as amended, 5 U. S. C. 863) are set forth in the Appendix, *infra,* pp. 1a–18a.

STATEMENT

Petitioner, who has veteran's status under the Veterans' Preference Act of 1944 (Appendix, *infra,* pp. 17a–18a), held a position in the classified service as a Food and Drug Inspector in the New York District of the Food and Drug Administration in the Department of Health, Education, and Welfare. In that position he did not have access to Government secrets or classified material and was not in a position to influence policy against the interests of the

Government. (R. 10, 40.) In October 1953, petitioner was interviewed by the Chief of Personnel Security of the Department of Health, Education, and Welfare in connection with an investigation regarding his retention in employment under the Government employees security program, a program established by Executive Order 10450 (Appendix, *infra*, pp. 4a–16a).[1] During this interview, petitioner was questioned concerning his attitudes, associations and friends. (R. 3, 37.)

On November 13, 1953, petitioner received a notice of suspension "pending investigation under Executive Order 10450" (R. 3, 38). The Under Secretary of the Department of Health, Education, and Welfare, by letter dated November 25, 1953 (R. 16–18), informed petitioner of the reasons for his suspension and set forth the following written statement of charges (R. 16–17):

> 1. That you established and have continued a close association with individuals reliably reported to be Communists.
>
> 2. That you have maintained a continued and sympathetic association with the

[1] The Preamble of the Order recites that it is based upon the authority vested in the President "by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, *et seq.*) [P. L. 733, 81st Congress], and as President of the United States, * * *" (Appendix, *infra*, p. 5a).

> Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.
>
> 3. That you have, by your own admission, donated funds to the Nature Friends of America.
>
> 4. That you have contributed your services in the form of work to the Nature Friends of America.
>
> 5. That you have attended social gatherings of the Nature Friends of America.

The letter further informed petitioner that he might submit, within thirty days, statements or affidavits refuting or explaining the charges, and that he was entitled to a hearing if he requested one.

On December 23, 1953, petitioner replied to the letter of the Under Secretary, refusing "to make any explanation regarding the associations carried on in my private life" on the following grounds (R. 19):

> * * * I consider any request by the United States Government for me to make an explanation regarding my personal choice of friends and social activities as an invasion of my private rights and of my basic inherent right of "freedom of association."

Petitioner was thereupon informed by the Department, by letter of January 4, 1954, that since it appeared from his letter that he did not desire

a hearing, his case had been forwarded to the Secretary for final disposition and he would be advised of the determination made (R. 20).

On January 15, 1954, the Secretary,[2] after referring to the letter of the Under Secretary, to the statement of charges, to the sections of the Executive Order upon which the charges were based, to petitioner's reply refusing to offer any explanation "regarding the associations carried on in your private life", and to his declared intention to "continue to associate with any persons or groups of persons whom you see fit to choose", advised petitioner that (R. 21):

> Based on a study of all the documents in your case, including your reply to reference letter, it has been determined that your continued employment in the Department of Health, Education, and Welfare is not clearly consistent with the interests of national security. Therefore, your termination has been ordered effective at the close of business January 20, 1954.

On January 27, 1954, petitioner's counsel sought to reopen petitioner's case on the ground that petitioner had been in a "post-operational depression" but now believed he could refute the

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[2] By order of this Court, dated November 21, 1955, Marion B. Folsom, present Secretary of Health, Education, and Welfare, was substituted as a party respondent in the place and stead of Oveta Culp Hobby, resigned (R. 65). References in this brief to the actions taken by the respondent Secretary in this case are to Mrs. Hobby.

charges against him (R. 22, 23). Sworn affidavits were enclosed with the letter (R. 24–26). Petitioner's counsel again wrote the Department on January 29, 1954, stating that if a hearing were granted petitioner would disprove the charges (R. 27). The Secretary advised petitioner's counsel on February 4, 1954, that the request for reopening was denied (R. 28). On February 10, 1954, petitioner's counsel again wrote the Secretary reiterating his previous statements and asserting various procedural and constitutional objections (R. 29–31). On February 24, 1954, the Secretary replied, again declining to reopen the case, stating that petitioner's separation was accomplished in accordance with Executive Order 10450, and that the validity and constitutionality of the Executive Order and the constitutionality of P. L. 733, 81st Congress, were not matters to be determined by that Department (R. 32).

Petitioner appealed his discharge to the Second Civil Service Region of the Civil Service Commission on February 25, 1954, claiming violations of the Veterans' Preference Act and the Civil Service Commission's regulations thereunder. The Civil Service Regional Director declined to accept this appeal, on the ground that the Veterans' Preference Act is not applicable to determinations made pursuant to P. L. 733 and Executive Order 10450. On petitioner's appeal to the Civil Service Commission, this ruling was affirmed (R. 33–36).

On May 28, 1954, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment invalidating his discharge by the Secretary of Health, Education, and Welfare; for similar relief declaring the refusal of the Civil Service Commission to hear petitioner's appeal to be null and void and in violation of the Veterans' Preference Act; and for an order restoring him to his position as a Food and Drug Inspector as of the date of his discharge (R. 2–13).

After the filing of the answer (R. 37–42), petitioner and respondents filed cross-motions for judgment on the pleadings (R. 43, 44). On October 26, 1954, the District Court, holding that the Executive Order validly extended the coverage of P. L. 733 to include petitioner's position, granted respondents' motion for judgment on the pleadings and dismissed the amended complaint (R. 53). The Court of Appeals affirmed, Judge Edgerton dissenting (R. 55–63).

SUMMARY OF ARGUMENT

I

A. 1. Petitioner's primary contention is that the provisions of P. L. 733 apply only to "sensitive" or "policy making" positions in agencies concerned with military matters, foreign relations, and related programs, and hence that the President was not authorized to make its provisions applicable to the Department of Health, Educa-

tion, and Welfare. But P. L. 733 is explicit on this point. In clear and unambiguous language, the Act provides that the head of each department and agency named therein may discharge "any" employee, and that its provisions shall apply to "such other" departments and agencies "as the President may * * * deem necessary." The sole limitation placed upon department heads and upon the President is that, in their discretion, they deem such action "necessary or advisable in the interest of the national security." No mention whatsoever is made in P. L. 733 of "sensitive" or "policy making" positions, nor does the Act define or limit the words "necessary," "advisable," or "national security."

2. Petitioner to the contrary, the legislative history of the Act does not show, consistently and convincingly, that Congress meant other than what it said. While petitioner can extract isolated statements which seemingly support his position, these statements, read in context, were merely descriptive of the immediate impact of the bill and of its intended use under then existing programs. Thus, some spokesmen for the bill referred to "security risks" in terms of access to classified material in "sensitive" agencies. The same spokesmen also pointed out, however, that the bill had been drafted broadly enough to cover loyalty as well as security cases and thus was not limited to employees having access to classified

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material. Significantly, the facts that the bill did not define what a "security risk" was (a term not even employed in the Act), that no distinction was drawn between so-called sensitive employees and other employees, and that the President was authorized to include *all* executive agencies within its provisions, were basic to the opposition of those who objected to the bill because, as drafted, it did not permit an appeal to the Civil Service Commission. On the other hand, supporters of the measure were clearly aware of those factors and approved the bill's treatment of them. In our view, the legislative materials support the validity of Executive Order 10450. But at the very least, the history of the Act is not sufficiently clear and compelling to warrant reading limitations into the Act that were not placed there, in terms, by Congress.

3. Petitioner's argument that, prior to the issuance of Executive Order 10450 in April 1953, various executive officers themselves drew a distinction between "sensitive" and "nonsensitive" positions under P. L. 733 is unfounded. In particular, petitioner places great stress upon a 1952 report of the Interdepartmental Committee on Internal Security. But this report was a policy recommendation and not a legal memorandum. Moreover, the Committee did not unequivocally take a position which conflicts with Executive Order 10450. And, in any event, the

authoritative administrative interpretation of P. L. 733 is the Executive Order itself.

B. Petitioner further argues that Executive Order 10450 is invalid because it divests agency heads of the discretion conferred upon them by P. L. 733. In fact, the Order follows the language of P. L. 733 *in haec verba,* providing for termination whenever the department head deems it "necessary or advisable in the interest of the national security." The Order does provide that department heads should be guided in determining what is "necessary or advisable" by the principle that no person should be employed unless his employment is "clearly consistent with the interests of the national security." But petitioner cannot well argue that this criterion is "more onerous" than that of the statute since the words "necessary or advisable" are not defined in P. L. 733 and are, of course, capable of many applications. At the very least, the President's standard is a permissible one.

As we see it, the real question is not whether the President has adopted a "more onerous" standard but whether he is completely without power to adopt any criterion and to direct his department heads to be guided by that test in exercising their statutory discretion. If Congress had meant to prohibit the President from so acting under P. L. 733, a serious constitutional question would arise, but we agree with the court below that that problem is not here presented.

It must be presumed that Congress knew that subordinate executive officers act under the direction of the President and that it had that principle in mind when it conferred discretion upon those officers. Moreover, even assuming that P. L. 733 does authorize agency heads to disregard the President's regulations in their discretion, the Act plainly does not repeal the power of the President to establish such regulations nor prohibit agency heads from following them.

Finally, Congress has confirmed and ratified the action of the Chief Executive. It deliberately refused all-inclusive dismissal authority to certain department heads because Executive Order 10450 was deemed sufficient; also, appropriations for the enforcement of that Order have continued to be made. Since it is well settled that Congress may ratify acts which it might have authorized and give the force of law to official action unauthorized when taken, the absence of legislative sanction for the Executive Order at the time of its issuance would be immaterial.

C. Petitioner also appears to argue that his removal was invalid as not actually necessary or advisable in the interest of national security. But apart from the general assertion that a loyal person in a non-sensitive position *cannot* be a "security risk", there is no showing here that the Secretary acted on grounds so unrelated to the national security that her action must be termed arbitrary or capricious. Accordingly, the

repeated ruling of the courts that they will not inquire into the merits of an administrative determination of what constitutes cause for discharge is dispositive here. And it is plain that retention of a loyal employee with continued close Communist associations could reasonably be deemed detrimental to the national security even though he had no access to classified data.

II

A. Petitioner's final contention is that his discharge did not comply with a procedural requirement of P. L. 733. The argument is that the provision in section 1 of P. L. 733 that the employee be furnished "a written statement of the decision of the agency head" means a statement of the reasons for the result rather than a statement of the ultimate determination made by the agency head. Here again, petitioner seeks to read something into the Act which Congress did not say, and there is nothing in the legislative history which suggests that Congress intended "decision" to mean "reasons." Petitioner relies on cases arising under the Lloyd-LaFollette and Veterans' Preference Acts. But P. L. 733 expressly makes those statutes inapplicable and their terms are markedly different from those of P. L. 733; those Acts make a clear and unmistakable distinction between the "reasons" for the removal and the "decision" to dismiss, and (unlike P. L. 733) require that both be furnished.

B. Assuming, however, that P. L. 733 requires something more than a mere statement of the determination by the agency head that employment should be terminated, there has been substantial compliance in this case. Fairly read, the Secretary's letter fully advised petitioner of the basis upon which the determination rested. In the light of petitioner's refusal to request a hearing, we think it clear that the Secretary need not give him a more elaborate and detailed statement of the "reasons" for his dismissal than she did.

ARGUMENT

INTRODUCTION

Under Section 14 of the Veterans' Preference Act of 1944 (58 Stat. 387, as amended, 5 U. S. C. 863, Appendix, *infra,* pp. 17a–18a) a "preference eligible" whose discharge is sought is entitled to: (1) thirty days advance written notice, (2) stating the reasons for such proposed action, (3) a reasonable time for answering the same personally and in writing, and (4) a hearing on appeal to the Civil Service Commission from an adverse decision.[3] In the present case, petitioner, a "preference eligible," was given more than thirty days advance notice of his proposed discharge (R. 16–18, 21); he was informed of the

[3] The employee is not entitled to a hearing in the employing agency. *Washington* v. *Summerfield*, C. A. D. C., No. 12664, decided November 23, 1955.

reasons for that action (R. 16–17); he was afforded thirty days in which to answer the charges (R. 18); and, although Section 14 does not so require (see footnote 3, *supra*, p. 14), he was offered a hearing by the Department of Health, Education, and Welfare (R. 18). He was not, however, granted an appeal to the Civil Service Commission from the adverse decision of the Department (R. 33–36).

In these circumstances, if Section 14 applied to petitioner, his discharge was illegal for want of an opportunity to appeal. The Civil Service Commission declined to accept his appeal on the ground that he was not within the purview of Section 14 by virtue of P. L. 733, Eighty-first Congress (Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1 *et seq.*, Appendix, *infra*, pp. 1a–4a), as implemented by Executive Order 10450 (18 F. R. 2489, Appendix, *infra*, pp. 4a–16a) (R. 33–36). The ultimate question here presented, therefore, is whether the provisions of P. L. 733 and Executive Order 10450 take away the appeal right granted by Section 14.

Section 1 of P. L. 733 (Appendix, *infra*, pp. 1a–4a) states that "notwithstanding the provisions of section 6 of the [Lloyd-LaFollette Act] (5 U. S. C. 652), or the provisions of any other law," the head of each of eleven named departments and agencies "may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without

pay, any civilian officer or employee," and that, after certain procedural steps have been taken, the agency head concerned may "terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States * * *." The procedural rights granted to non-probationary citizen employees are: (1) a written statement, within thirty days of suspension, of the charges against the employee, stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter to answer the charges; (3) a hearing, at the employee's request, by the agency; (4) a review of his case by the agency head, or some official designated by him, before a final adverse decision is made; and (5) a written statement of the decision of the agency head. No appeal to the Civil Service Commission is provided, and the "determination by the agency head concerned shall be conclusive and final."[4]

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[4] It is apparent from these provisions that, contrary to Judge Edgerton's characterization of the Act, P. L. 733 does not provide for "summary unappealable dismissal" (R. 62). Rather, it is a summary *suspension* statute. With respect to dismissal, P. L. 733 provides substantially the same protection to employees as Section 14 of the Veterans' Preference Act. Both acts provide for a hearing; they differ in that the Veterans' Preference Act grants that hearing on appeal to the Civil Service Commission (see fn. 3, *supra*, p. 14), whereas P. L. 733 grants that hearing within the agency and an appeal to the agency head. It should be further

In the light of these provisions, it seems clear that if petitioner had been employed in one of the eleven departments and agencies enumerated in P. L. 733, Section 14 of the Veterans' Preference Act would not have applied to his discharge. The employing agency here involved, the Department of Health, Education, and Welfare, is not one of those eleven agencies.[5] However, Section 3 of P. L. 733 (Appendix, *infra*, p. 4a) provides that "[t]he provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security." And, in Section 1 of Executive Order 10450 (Appendix, *infra*, p. 5a), the President, "deeming such action necessary in the best interests of the national security," ordered that the provisions of P. L. 733 "shall apply to all other departments and agencies of the Government."

It follows that if Executive Order 10450 is a valid exercise of the authority vested in the President by P. L. 733, petitioner was not entitled to appeal his discharge to the Civil Service Com-

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noted that, far from being a summary dismissal statute, P. L. 733 gives non-veteran employees more rights—except with respect to suspension—than they would otherwise have under the Lloyd-LaFollette Act (5 U. S. C. 652), since the latter Act does not provide for any hearing.

[5] The named agencies are the Departments of State, Commerce, Justice, Defense, Army, Navy, Air Force, and Treasury, the Atomic Energy Commission, the National Security Resources Board, and the National Advisory Committee for Aeronautics.

mission under Section 14 of the Veterans' Preference Act, and his dismissal was valid. Petitioner's primary contention is that the President could not validly extend the provisions of P. L. 733 to the Department of Health, Education, and Welfare, and that that Act authorized the President to extend its provisions only to "sensitive" or "policy making positions" in agencies primarily concerned with military matters, foreign relations, and related programs. This issue is discussed in Point I, A, *infra*, pp. 20–42.

The second question raised by petitioner assumes that the President was authorized to make the provisions of P. L. 733 applicable to the Department of Health, Education, and Welfare (thus depriving petitioner of the protection afforded by the Veterans' Preference Act), but argues that the Executive Order is nevertheless invalid because it unlawfully divests department and agency heads of the discretion vested in them by P. L. 733. On this score, petitioner's position is that, while P. L. 733 authorizes an agency head to discharge an employee whenever he shall determine such termination "necessary or advisable in the interest of the national security of the United States," the Executive Order supposedly prescribes a more rigid test of suitability by requiring the discharge of any employee whose retention is not "clearly consistent with the interests of the national security." We discuss this second issue in Point I, B, *infra*, pp. 42–62.

The third question assumes that Executive Order 10450 is fully valid but urges that petitioner's dismissal was unlawful because the notice of dismissal failed to set forth the reasons for the Secretary's determination that his employment should be terminated; petitioner's contention is that Section 1 of P. L. 733, providing that the employee be furnished "a written statement of the decision of the agency head", requires a specific statement of the reasons for the result rather than a statement of the ultimate determination made by the agency head. This last issue is discussed in Point II, *infra*, pp. 66–74.[6]

As petitioner recognizes (Pet. 22), this case does not involve the issues "of confrontation and cross-examination" which were before this Court in *Bailey* v. *Richardson*, 341 U. S. 918, and *Peters*

[6] In the Court of Appeals, respondents argued that petitioner failed to exhaust his administrative remedy and that this action must therefore fail. The court below held that this point is not well taken, stating that while petitioner failed to pursue the administrative remedy offered him, nevertheless the administrative process was exhausted and a final administrative decision was reached and rendered (R. 56). In our view, this ruling, in the form stated by the court, does violence to a fundamental postulate of the exhaustion doctrine, namely, that participation in, and exhaustion of, an administrative remedy may obviate the need for any judicial determination or may render more precise the scope of decision necessary. Cf. *Aircraft & Diesel Corp.* v. *Hirsh*, 331 U. S. 752, 772–773. We do not now, however, urge this point as an independent ground for affirmance, because, if petitioner is correct in the merits of his claim, he was entitled to the appeal to the Civil Service Commission which was denied him.

v. Hobby, 349 U. S. 331. Since petitioner rejected the Departmental hearing offered to him (see Statement, *supra*, pp. 5–6; *infra*, pp. 71–73), no questions are or can be presented as to hearing procedure or conduct, or as to the proof which might have been adduced at such a hearing.

I

EXECUTIVE ORDER 10450 IS VALID AS APPLIED TO PETITIONER

A. P. L. 733 AUTHORIZES THE PRESIDENT TO MAKE ITS PROVISIONS APPLICABLE TO THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND HIS DETERMINATION IS NOT SUBJECT TO JUDICIAL SCRUTINY

1. *The language of P. L. 733.*—Based upon his reading of the legislative and other materials, petitioner argues that the provisions of P. L. 733 apply only to "sensitive" or "policy making" positions in agencies concerned with military matters, foreign relations, and related programs (Pet. Br. 12–34). "The trouble with the argument," as the court below pointed out, "is that the statute itself is explicit on the point" (R. 57). Its coverage is not restricted either to "sensitive" positions or to a special class of agencies.

(a). As to the employee-positions covered by the Act, Section 1 of P. L. 733 expressly states, in the broadest possible terms, that the head of each of the eleven named departments and agencies (see fn. 5, *supra*, p. 17) may suspend "*any* civilian officer or employee" and terminate the employment of "*such* suspended civilian officer or em-

ployee" whenever he shall determine such suspension or termination necessary or advisable in the interest of the national security [emphasis added]. To read this language as applying solely to employees occupying "sensitive" or "policy making" positions is wholly to disregard the all-inclusive word "any", particularly so since no mention whatsoever is made in P. L. 733 of "sensitive" or "policy making" positions. Cf. *Ex parte Collett*, 337 U. S. 55, 58.

Petitioner argues, however, that the provision relating to "*any* civilian officer or employee" is necessarily qualified by the requirement that the termination must be "necessary or advisable in the interest of the national security" (Pet. Br. 15, 16, 23). Contending that the term "national security"—which is not defined in the Act—is similar to phrases such as "national defense" which appear in the context of other statutes, petitioner asserts that the meaning judicially ascribed to these other phrases demonstrates that the term "national security" has reference only to the safety of the nation and that P. L. 733 does not, therefore, cover "non-sensitive" and "non-policy making" employees (Pet. Br. 27, 29).

But this argument proceeds from the mistaken premise that P. L. 733 was intended to incorporate some external and judicial standard of "national security." The Act is not limited to those situations where termination *is* demonstrably (or can judicially be shown to be) "necessary or

advisable in the interest of the national security." Rather, P. L. 733 declares that an agency head may terminate the employment of "any civilian officer or employee * * * whenever *he* shall determine such termination necessary or advisable in the interest of the national security." (Emphasis added.) The scope of the agency head's power is not, therefore, circumscribed by some judicial test of "national security" but encompasses all cases within the agency head's own understanding of what may be "necessary or advisable in the interest of the national security." Significantly, P. L. 733 does not limit the words "necessary," "advisable," or "national security," but leaves the matter to the judgment of the agency head. Further, Section 1 provides that the agency head's determination that termination is "necessary or advisable" shall be "conclusive and final." It follows, therefore, that the agency head is not precluded by the terms of the Act from deciding that the retention of the occupant of a "non-sensitive" post could be adverse to the national security.

(b). Similarly, Section 3 of the Act puts the selection of the agencies to be affected solely in the hands of the President. Like Section 1, Section 3 does not say anything about "sensitiveness" or "policy making"; nor does it say that the provisions of the Act shall apply only to such other agencies as may judicially be determined to be necessary in the best interests of national

security. In this respect, also, the scope of the Act is committed to executive discretion. It explicitly declares that (Section 3, Appendix, *infra*, p. 4a) "the provisions of this Act shall apply to such other departments and agencies of the Government *as the President may*, from time to time, *deem necessary* in the best interests of national security." (Emphasis added.)

This unambiguous statutory language leaves little room for controversy. In his discretion, the President can, under Section 3, make P. L. 733 applicable to such other departments as *he* deems necessary. The determination is his alone, and the courts are not to oversee or revise his decision. Judicial scrutiny of the exercise of discretion vested by Congress in the President personally would be rare in any case, but the principle of abstention becomes absolute where the factors influencing the President's judgment lie in the realm of political and foreign affairs. Cf. *Chicago & Southern Airlines* v. *Waterman Steamship Corp.*, 333 U. S. 103; *Ludecke* v. *Watkins*, 335 U. S. 160; *Hirabayashi* v. *United States*, 320 U. S. 81, 93; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

2. *The legislative history.*—In the face of the precise language of P. L. 733, petitioner argues that this Court should nevertheless read limitations into the Act that were not placed there by Congress. Petitioner asserts that Congress did not intend to confer such broad authority upon the

President and agency heads, and that the legislative history of P. L. 733 shows consistently and convincingly that Congress never intended the Act to apply to employees such as petitioner. As we read the legislative history, it does not lead persuasively to petitioner's conclusion that Congress did not mean what it said. Cf. *Unexcelled Chemical Corp.* v. *United States,* 345 U. S. 59, 64; *United States* v. *Lindsay,* 346 U. S. 568, 570.

Admittedly, petitioner can extract isolated statements from the hearings, reports and debates which seemingly support his position (Pet. Br. 17, 19–26, 38–39). But these statements must be read in context and viewed in the light of other statements to the contrary. Thus, it is true, as petitioner points out, that Mr. Larkin, one of the spokesmen for the Department of Defense, defined a "security risk" in terms of access to classified material in a "sensitive" agency. This restricted view, however, was not unanimously held nor was it consistently taken. Moreover, it is by no means clear that these and similar statements had reference to the scope of the full authority proposed to be conferred upon the Executive branch by the bill. Rather, they were merely descriptive of the immediate impact of the bill and of its intended use by the Defense Department in connection with then existing programs.

For example, the Committee Reports stated that the bill did not deal with the removal of

disloyal employees but was concerned with loyal employees who are "security risks." See H. Rep. No. 2330, 81st Cong., 2d sess., p. 4; S. Rep. No. 2158, 81st Cong., 2d sess., p. 2. It does not follow from these statements, however, that the bill did not authorize the dismissal of disloyal employees as "security risks." To the contrary, the Defense Department, which authored the bill (Hearings before the House Committee on Post Office and Civil Service, 81st Cong., 2d sess., on H. R. 7439, pp. 2, 3), expressly advised the Congress that disloyal persons would be handled pursuant to Executive Order 9835 (12 F. R. 1935)—establishing the then federal employees' loyalty program—only so long as that Order was in effect. See House Hearings, *supra*, pp. 4, 59; H. Rep., *supra*, p. 6; S. Rep., *supra*, p. 4. That Department pointed out that, prior to Executive Order 9835, it had handled loyalty and security cases together under P. L. 808, 77th Congress (Act of December 17, 1942, 56 Stat. 1053), which authorized dismissals warranted by "the demands of national security." See House Hearings, *supra*, pp. 29, 64.[7] The Department of the Army stated that, even after the issuance of Executive Order 9835, it used P. L. 808 exclusively and drew no distinction between loyalty and security cases. See House Hearings, *supra*,

[7] The Act of December 17, 1942, was repealed by P. L. 733 (see Appendix, *infra*, p. 4a).

pp. 28–29, 34; cf. *Deak* v. *Pace*, 185 F. 2d 997 (C. A. D. C.). And, commenting on the statement in the House Report that the bill did not deal with the dismissal of disloyal employees, Mr. Larkin observed that "technically and legally it is broad enough to do so." See Hearings before the Senate Committee on Armed Services, 81st Cong., 2d sess., on H. R. 7439, p. 6. He reiterated that the authority provided in the bill "is broad enough to handle a loyalty case and a security case. While the President's loyalty program is in effect, continues in effect now, we would, of course, adhere to the procedures in the President's loyalty program for a loyalty case." *Ibid;* see also 96 Cong. Rec. 10025, 10027.

This testimony obviously qualifies Mr. Larkin's casual use of the phrase "security risk" solely in terms of access to classified information. Since, as the Committee reports noted (H. Rep., *supra*, p. 4; S. Rep., *supra*, p. 2), it was generally agreed that a disloyal employee is an aggravated "security risk" and should not be employed anywhere (even in a "non-sensitive" place) and since, as the Defense Department specifically pointed out, the bill had been deliberately and broadly drawn to cover loyalty cases if necessary, it is apparent that Congress used the all-inclusive term "*any* civilian officer or employee" as necessarily including *all* employees irrespective of whether their positions were "sensitive" or "policy making." In this light, Mr. Larkin's oral

definition of "security risk"—on which petitioner relies—must be understood as referring only to the use that would be made of the proposed Act by the Defense Department under then existing programs, rather than to the full scope of the dismissal power which would be conferred by the Act.[8]

In this connection, it is not without significance that the Committee made no mention of Mr. Larkin's testimony on this score in their reports. Instead, the House Committee quoted Under Secretary of the Navy Kimball's broader use of the phrase "security risk" as not limited to employees having access to classified material; Mr. Kimball stated generally that a Defense Department employee "may be a serious security risk due to his associations, affiliations, habits, or indiscreetness." See H. Rep., *supra*, p. 3; see also House Hearings, *supra* at 72–73 (quoted in Pet. Br. 26, n. 13); 96 Cong. Rec. 10021, 10024, 10028.[9]

[8] Petitioner asserts that Defense Department witnesses testified that that Department "had by its own security regulations distinguished between sensitive and non-sensitive jobs" (Pet. Br. 25). This assertion is not borne out by the Air Force regulations, which were the only regulations inserted into the record. See House Hearings, *supra* at 75, 76–86. Those regulations listed the extent of the employee's access to classified information as only one of several independent factors in the security evaluation. *Id.* at 76, 79.

[9] It is also not without significance, in view of petitioner's insistence that "security risk" relates only to persons with policy positions or access to classified material, that several persons objected that the bill did not define what a "security risk" was. Thus, Congressman Miller pointed out during the

Similarly, the statements in the Committee Reports to the effect that the bill dealt with "security risks" in "sensitive" agencies and that the bill made provision for the reemployment of such employees in "non-sensitive" agencies do not necessarily mean that Congress forbade the provisions of the Act from being extended by the President to all the departments and agencies. These statements merely described the immediate effect of the legislation, *i. e.*, that it was of immediate applicability only to eleven named "sensitive" agencies. Indeed, the fact that the President could extend the provisions of the bill "to any department or agency when, in his opinion, the national security requires it" (S. Rep., *supra*, p. 3; see also H. Rep., *supra*, p. 2) was an important factor in the opposition of those who objected to the bill because it did not permit an appeal to the Civil Service Commission.

During the debates in the House, several amendments were offered to provide for some form of independent review. The amendments were rejected. In explanation of his amendment,

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hearings that the bill contained no definition of "security risk." See House Hearings, *supra*, p. 50. Similar observations were made by Congressmen Holifield, Gross and McCarthy on the floor of the House. See 96 Cong. Rec. 10021, 10024, 10028, 10031. And representatives of employees' organizations and the American Civil Liberties Union protested that the bill's lack of definition in this respect left the scope of its application too much to executive discretion. See House Hearings, *supra*, pp. 42, 43, 49, 50, 54.

Congressman Holifield called the House's attention explicitly to the unequivocal language of the bill authorizing the summary suspension and dismissal of *any* employee in *any* department or agency, and argued that these provisions necessitated affording employees protection against arbitrary dismissals. Mr. Holifield stated (96 Cong. Rec. 10023–10024):

> *In section 3 of the bill the President is given authority to include, in the terms of this act, all executive agencies. So this applies potentially to every executive agency, not only the sensitive ones.* We must keep that in mind in the first place.
>
> *In the second place, there is no distinction made in the bill between so-called sensitive employees, that is, employees who have access to confidential and secret information, and the regular employees.* In many instances 75 or 80 percent of the department's employees, those in clerical position and those running elevators and doing janitor work and manual work are not what would be called sensitive employees and are not in positions where they could be security risks.
>
> *Passage of this bill would obviate the necessity of using the loyalty procedure and any department of the Government could dismiss any employee if the agency head or his subordinates want to.* That is the same procedure which the Army has been using and which the gentleman from

California [Mr. Miller] just finished condemning. The Navy and the Air Force are using the loyalty procedure method giving the employee the right to appeal for a hearing before an independent board. The Army has not; the Army has been dismissing its employees, making no charges, but just summarily dismissing them. Such persons could be reemployed in other agencies of the Government.

Finally, the reason my amendment goes further than the Miller amendment and makes it mandatory for the head of an agency to accept the appeal board's decision is because we are dealing in very indefinite terms. *The term "security risk" has no definition. It is so vague and fuzzy that any Federal employee's job can be jeopardized. Because the reasons for dismissal are not defined clearly, we should be more anxious than ever to protect the employee from arbitrary and discriminatory actions. The Under Secretary said it might be according to a man's associations, to his affiliations; to his habits, or because he was indiscreet.* So because we are going so much further and entering into a field which goes far beyond loyalty or disloyalty, I say that the amendment should go beyond that and that the employee should be given the protection of an independent review board. That is why my amendment is offered in the terms of a substitute. [Emphasis added.]

The broad scope of the President's power under the bill was also pointed out during the Senate Hearings. The question was initially raised by Senator Chapman, who asked Mr. Larkin to tell the Committee which federal agency he thought ought not to be classified as a "sensitive" agency. The following exchange then occurred (Senate Hearings, *supra*, pp. 15, 16, 17):

> Mr. LARKIN. The Federal agencies which do not have classified material. A lot of Federal agencies hire droves of laborers, they do not have access to classified material at all.
>
> Senator BYRD. *Section 3 gives the President the right to classify every agency as a sensitive agency.*
>
> Mr. LARKIN. *That is right.*
>
> Senator BYRD. *He could take the whole Government. This bill refers to about a million employees. We have 2,000,000. He could put the other 1,000,000 in.*
>
> Senator CHAPMAN. I do not see why the whole Government is not sensitive as far as that is concerned. [Emphasis added.]
>
> * * * * *
>
> Senator BYRD. I want to ask about section 3. Does the President have to give his reasons for including other agencies as sensitive agencies or just say that they should be?
>
> Mr. LARKIN. I think he would have to make a finding that he deems it necessary in the best interests of national security that

Department X now have this power because of the sensitive character of the work they are now doing.

Senator BYRD. In other words, he just declares it to be so and does not have to give any reasons?

Mr. LARKIN. No, sir.

Senator BYRD. Was this in the legislation we passed in the 80th Congress?

Mr. LARKIN. Yes, sir.

Senator BYRD. This same clause?

Mr. LARKIN. Yes, sir.

Senator BRIDGES. Don't you think he should give some reason when he makes the change, that he should make a finding?

The CHAIRMAN. Mr. Larkin, let me interpose and ask Senator Bridges and you both this question: *If we want to get these subversives out of Government and we want to get these security risks out of Government and we designated only a part of the governmental agencies here where the regulations we put up apply, why shouldn't we give the President the power to get them out of all branches of the Government?* Why leave a part of it where he cannot act at all? It seems to me we should put them all in or give the President the right to put them all in. We do not want to do a 50 percent job on these fellows.

Mr. LARKIN. *We have delineated here what is generally regarded as the sensitive agencies that need that authority at this time. If there are others that become sensitive, the President can at that time give*

them the power. In the event they do not become sensitive or are not sensitive, there is no need for the power. [Emphasis added.]

* * * * *

The CHAIRMAN. I think without this provision in here we are now discussing, to take an extreme case—it may sound a bit hysterical—you could take a man in the Park Service that has charge of great forests. There is nothing more important to the war effort than timber. He is a questionable fellow, a risk. He could do a great deal of damage to the timber reserves of the country. You might want to let him go. *So I think, therefore, that you have got to either put every branch of the Government in here alike or you have got to give the President the authority to put them in whenever it appears wise so to do.*

Mr. LARKIN. *We have felt that that latter is the better way to do it.* This power should not be granted willy-nilly. [Emphasis added.]

* * * * *

Senator Chapman then asked Mr. Larkin what objection, if any, he would have to making the bill apply to all agencies. Senator Bridges interjected that he personally had no objection, and Senator Hunt suggested that Section 3 be amended to say "[t]he provisions of this act shall apply to all other departments—period." Senate Hearings, *supra*, p. 17. Mr. Larkin replied that "I

think it is unnecessary. I do not know how the Bureau of the Budget and the President feel about it. We left it so that if the need arises it can be taken care of without further legislation. * * *" *Ibid.*

Subsequently, Senator Morse stated that he agreed "it ought to cover all of them. If your procedure is fair, I see no reason why a bad security risk should be in any department or a person that meets the qualifications of the type of persons Senator Bridges is talking about." Senate Hearings, *supra,* p. 19. He objected, however, to the lack of any provision in the bill for an appeal to some independent body. Senate Hearings, *supra,* pp. 19–24.

Senator Hunt's amendment to Section 3—making the bill apply to all departments—was then put to a vote. Again, Mr. Larkin stated that he believed the amendment to be unnecessary. The Committee was evenly divided, and the amendment was not carried. Senate Hearings, *supra,* pp. 25–26. In explanation of his vote, Senator Morse stated "that although I want to see such persons as we are trying to eliminate from Government employment eliminated from all departments, I could not vote for the amendment until I thought there was a proper procedure in there that would check arbitrary action on the part of dismissing officers." *Id.* at 26.

At a subsequent meeting of the Committee, Senator Saltonstall offered an amendment (Sen-

ate Hearings, *supra*, pp. 33–40) "that goes a long way toward what Senator Morse is arguing about" (*id.* at 39). The amendment, which was accepted by the Committee (*id.* at 40) and ultimately adopted by Congress (96 Cong. Rec. 12048–12049, 12569), changed the reemployment proviso of Section 1 so as to authorize the Civil Service Commission to determine at the written request of the terminated employee whether he is eligible for employment by any other agency or department of the Government (Senate Hearings, *supra*, at 39).

If any conclusion is to be drawn from this legislative history, we believe that the materials support the validity of Executive Order 10450, in that the view was strongly expressed and reiterated that the President could extend the Act to all agencies and departments. See also *infra*, pp. 57–61. At the very least, the legislative history is not so consistent and compelling as to warrant reading into the language of the Act limitations which are inherently precluded by those terms. The only comfort that petitioner can draw from the Congressional materials is that Congress did contemplate that an employee who was discharged under the Act for security reasons from one department might be able to obtain employment in a different department. That is not to say, however, as we have shown, that Congress did not intend to authorize the President to extend the provisions of the Act to all the departments and

agencies. The Congressional purpose to preserve employee reemployment rights could be, and in fact has been, given effect even though all departments and agencies are covered by the Act. Thus, Section 7 of the Executive Order (Appendix, *infra*, pp. 8a–9a) provides, in accord with Section 1 of P. L. 733, that a dismissed employee may be employed by another department or agency after a determination by the Civil Service Commission that he is eligible for such employment and a finding by the head of the department that reemployment is clearly consistent with the interests of the national security. See also 5 C. F. R. (1955 Supp.) 9.108.[10]

3. *Post-enactment executive action.*—Seeking to buttress his reading of P. L. 733, petitioner contends that, prior to the issuance of Executive Order 10450 in April 1953, various executive officers themselves drew the distinction he advances here between "sensitive" and "non-sensitive" positions (Pet. Br. 25–28, 39, 45). Petitioner's view of these other executive interpretations is unfounded. But even if it were true, the

[10] According to the records of the Civil Service Commission for the period May 27, 1953 through December 17, 1955, seventy-six employees who were dismissed under the procedure established by P. L. 733 and the Executive Order requested clearance for reemployment from the Commission. Favorable decisions were rendered in fifteen cases and adverse decisions in forty cases. Twenty-one cases were closed without action, because the employee withdrew his application or was rehired.

authoritative administrative interpretation of P. L. 733 would be Executive Order 10450 itself.

Petitioner first cites Section 3 (a) of the 1951 Defense Department regulations, as quoted in Bontecou, The *Federal Loyalty-Security Program* (1953 ed.) p. 349, and asserts that that section authorized the termination of an employee, cleared on loyalty grounds, only where the employee held a "sensitive" position in the Department (Pet. Br. 25–26). To begin with, Section 3 (a) of those regulations dealt with suspension and not with termination. The standard for termination was set forth in Section 4 of the regulations and was simply that, "on all the evidence, reasonable grounds exist for belief that this termination is necessary or advisable in the interest of the National security." *See Bontecou, op. cit., supra.* Further, Section 3 (a) of the regulations did not even use the word "sensitive." It authorized suspension where an employee's retention in duty "would jeopardize the security of the activity *or* of classified material, which in turn affects the National security." (Emphasis added.) See Bontecou, *op. cit., supra.* Accordingly, even the suspension provision of the Defense Department regulations was not limited to employees having access to classified information, and the criterion for dismissal did not refer to "sensitivity" or to classified material.

Similarly, while the 1951 regulations of the State Department also referred to employees who

have access to classified information, those rules, too, were not limited in scope to such employees. Entirely apart from the category of employees with access to classified information, Sections 393.2 and 393.3 of the regulations defined a security risk as including an employee who is a member of, affiliated with, or in sympathetic association with an organization on the Attorney General's list—a basic charge against petitioner in the instant case. See Bontecou, *op. cit., supra,* at 326–327.

Petitioner also quotes Miss Bontecou's understanding of the operation of the various loyalty-security programs prior to Executive Order 10450 as supporting the distinction between "sensitive" and "non-sensitive" positions (Pet. Br. 28–29). But petitioner omits the very important qualifying sentence preceding his excerpt, *i. e.*, "*In theory* the two issues [loyalty and security] are quite different." See Bontecou, *op. cit., supra,* at 48. (Emphasis added.) And petitioner also omits Miss Bontecou's later observation that "[o]ne can only conclude that the practice has blurred, if it has not wiped out, the distinction between the two issues." *Id.* at 51.

Petitioner likewise places great stress upon a White House press release (No. 3326, Aug. 8, 1952) which includes a document captioned "A Report By The Interdepartmental Committee On Internal Security On The Government Employee Security Program" (Pet. Br. 27, 33, 62–66). In

particular, petitioner points to pages 13–16 of the Report, which express the opinion of the authors that the authority granted by P. L. 733 should be applied only to employees occupying "sensitive" positions in agencies concerned with the ability of the country to protect and defend itself against hostile or destructive action. But this Report cannot be deemed a definitive interpretation of the scope of P. L. 733 on the part of the Executive branch. Although some members of the Interdepartmental Committee were attorneys, the Committee as a whole was concerned with the coordination of the administration of the various loyalty-security programs rather than with questions of law. The Report discloses that it comprised a number of policy recommendations to the President and was not a legal memorandum. To the extent that the Committee did express the legal opinion petitioner ascribes to it, that opinion was, of course, overridden by the President's legal advisers in the drafting of Executive Order 10450.

Moreover, it cannot be said that the Committee unequivocally took a position which conflicts with Executive Order 10450. Thus, immediately following the passages cited by petitioner, the Report states that (p. 16):

> Desirable uniformity among departments and agencies with employee security programs can best be achieved if these programs are all based upon the same legal authority. At the present time there are

> many different provisions of law which can be construed to form the basis for employee security programs in various departments and agencies. The most significant of these is Public Law 733, 81st Congress, which authorizes suspensions and removals "in the interest of national security."

Continuing, the Committee declared that (p. 17):

> The Committee believes that those agencies which have need of an employee security program should each have the same basic legal authority upon which to establish such a program. This is the best way to assure such uniformity in the administration of the programs as may be desirable.
>
> With respect to employees, Public Law 733 contains the necessary elements for a personnel security program which can protect the legitimate interests of the national security and at the same time guarantee certain basic rights to employees.

Finally, in its transmittal memorandum of April 29, 1952, to the National Security Council Representative On Internal Security, the Committee recommended (White House release No. 3326, Transmittal Memorandum, p. 2) that "a detailed study should be made of these three programs looking toward evolving a single general program to cover eligibility for employment in the Federal Service, whether on grounds of loyalty, security, or suitability."

In accord with this final recommendation, President Truman announced, in releasing the Report on August 8, 1952 (White House release No. 3326, Letter to Chairman of Civil Service Commission, p. 1), that "I have concluded that the most desirable action at this time would be to merge the loyalty, security, and suitability programs, thus eliminating the overlapping, duplication, and confusion which apparently now exist. * * * Accordingly, I should like for the Civil Service Commission to take the necessary steps to provide me with a plan for combining the three existing programs into one at the earliest practicable date."

In January 1953, while the Civil Service Commission was still formulating a new program in response to President Truman's request, the present Administration came into office. The new Administration made its own reappraisal of the problem and concluded, as President Eisenhower stated in his State of the Union Address (H. Doc. No. 75, 83d Cong., 1st sess., p. 9), "that the powers of the executive branch under existing law are sufficient" to initiate "effective programs of security" with respect to the personnel of "all executive departments and agencies." Finding that "the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good con-

duct and character, and of complete and unswerving loyalty to the United States" and that "equitable treatment * * * requires that all persons * * * employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures" (Preamble of Executive Order 10450, Appendix, *infra*, pp. 4a–5a), the President issued Executive Order 10450, extending the provisions of P. L. 733 to all departments and agencies.

B. EXECUTIVE ORDER 10450 DOES NOT UNLAWFULLY DIVEST AGENCY HEADS OF THE DISCRETION VESTED IN THEM BY P. L. 733

Petitioner further argues that, assuming that P. L. 733 authorizes the President to extend its provisions to a Department such as Health, Education and Welfare, Executive Order 10450 is nevertheless invalid because it divests agency heads of the discretion conferred upon them by P. L. 733. The thesis is that the Order conflicts with the Act in that the former supposedly provides that the agency head *"shall"* deny employment if it is not *"clearly consistent with the interests of the national security,"* while the latter provides that the agency head *"may"* deny employment if he deems it *"necessary or advisable in the interest of the national security."* (Pet. Br. 35–47.) The point is without merit for several reasons.

1. *In accordance with P. L. 733, Executive Order 10450 provides for dismissal only where the agency head determines that termination is "necessary or advisable in the interests of the national security."*—Except for Section 7 of Executive Order 10450, petitioner misreads the Order. That Section (Appendix, *infra*, pp. 8a–9a) provides that any person whose employment is terminated under P. L. 733 "shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security * * *." Since P. L. 733 states that a terminated employee "may, in the discretion of the agency head concerned, be reinstated or restored to duty * * *," it is arguable that Section 7 of the Order is in conflict with the Act. But see *infra*, pp. 48–61. Assuming *arguendo* that there is a conflict, however, it is irrelevant in this case. There is no allegation here that petitioner was denied reinstatement or reemployment because of a determination made under Section 7 of the Order. The issue here is not what the Secretary or some other agency head might have done if petitioner had applied for reemployment, or the validity of the Secretary's actions in other cases where such

application was made, but whether the original termination of petitioner's employment is valid."

With respect to termination, involved here, the Order follows the language of P. L. 733, stating *in haec verba* (Section 6, Appendix, *infra*, p. 8a) that should information develop indicating that employment of any employee may not be clearly consistent with the interests of the national security, the agency head "shall immediately suspend the employmnt of the person involved *if he deems such suspension necessary in the interests of the national security* and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee *whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950* [P. L. 733]." [Emphasis added.]

The only verbal difference between Section 6 of the Executive Order and P. L. 733 is that the Act provides that an agency head "*may*" terminate employment "whenever he shall determine

[11] Compare *Yakus* v. *United States*, 321 U. S. 414, 434: "* * * we have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review, and obviously we cannot pass upon action which might have been taken on a protest by petitioners, who have never made a protest or in any way sought the remedy Congress has provided."

such termination necessary or advisable in the interest of the national security of the United States" while the Order states that the agency head "*shall*" terminate employment whenever the same determination is made. "May" and "shall" are often used interchangeably, but even putting that aside, an objection based upon such a difference in phraseology is more theoretical than real. It is highly improbable, if not inconceivable, that the head of a department or agency would determine that an employee's dismissal was "necessary or advisable in the interest of national security" and then fail to exercise the dismissal power conferred by the Act, especially since the sole purpose of making such a determination is to exercise that power. The authority granted by Congress is not the discretion to retain "security risks" but the authority to dismiss those persons whom the agency head in his discretion determines to be "security risks," and that discretion is reiterated, not destroyed, in the Executive Order.

2. *The Executive Order does not prescribe a more onerous standard of judgment than that provided in P. L. 733.*—A further objection is predicated on the declaration in the Executive Order that agency heads shall be guided, in determining whether termination is "necessary or advisable in the interest of the national security", by the principle that no person should be employed unless his retention is "clearly consistent with the

interests of the national security.'"[12] Petitioner

[12] Section 2 of the Order (Appendix, *infra*, pp. 5a–6a) states that each agency head "shall be responsible for establishing and maintaining within his department or ageney an effective program to insure that the employment and retention in employment of any civilian officer or employee * * * is clearly consistent with the interests of the national security." Section 3 (a) (Appendix, *infra*, p. 6a) states that should information develop indicating that the employment of any such person "may not be clearly consistent with the interests of the national security," such investigations shall be made as shall be sufficient to enable the agency head to determine whether retention of such person "is clearly consistent with the interests of the national security." Section 4 (Appendix, *infra*, p. 7a) directs the readjudication of the cases of all employees "in accordance with the said act of August 26, 1950 [P. L. 733]" as have not been adjudicated "under a security standard commensurate with that established under this order." Section 5 (Appendix, *infra*, p. 8a) states that whenever any department or agency receives information that retention of any employee "may not be clearly consistent with the interests of the national security," such information shall be forwarded to the head of the employing agency for review and adjudication "in accordance with the said act of August 26, 1950 [P. L. 733]." Section 6, as noted above, pp. 44–45, provides that when information indicates that employment of any employee "may not be clearly consistent with the interests of the national security," the agency head shall suspend and terminate such person's employment whenever he deems it "necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950 [P. L. 733]." Section 7, as noted above, pp. 43–44, provides that terminated employees shall not be reinstated or reemployed unless the agency head concerned finds it to be "clearly consistent with the interests of the national security." Section 8 (Appendix, *infra*, pp. 9a–12a) declares that investigations conducted pursuant to the Order shall be designed to develop information as to whether the employment of the person concerned "is clearly consistent with the interests of the national security."

contends that the Order thus prescribes a "more onerous" standard of judgment than that provided by Congress in P. L. 733 (Pet. Br. 44–47). But this contention presupposes a non-existent premise—the premise that the words "necessary or advisable in the interest of the national security" have a particular and fixed meaning. As we pointed out earlier, *supra*, pp. 20–23, those words are not defined in P. L. 733 and determination of what is "necessary or advisable" is committed to the discretion of the agency head concerned.

The standard prescribed by P. L. 733 is, therefore, theoretically capable of many applications.[18] It may be that the standard adopted by the Executive Order is more stringent than that which a particular agency head might have adopted; on the other hand, it is possible that the President's standard gives employees greater protection than the test which a particular agency head might have adopted. Accordingly, petitioner cannot

[18] In this connection, it should be observed that the lack of a definition in P. L. 733 does not render the Act invalid as an improper delegation of legislative power. Without venturing into the intricacies of executive-legislative relationship with respect to executive employees, we think it sufficient to point out that the Constitution vests primary responsibility over the selection and tenure of employees in the Executive branch. Accordingly, when Congress enacts a statute which broadly confirms that responsibility—particularly in the area of national security—it is in no sense abdicating a legislative function. Cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; see also *infra*, pp. 48–65.

well argue that the criterion contained in the Order is "more onerous" than that of the statute. At the very least, the President's standard (*i. e.*, "clearly consistent with the interests of the national security") is a permissible interpretation of what is "necessary or advisable in the interest of the national security." To quote the court below (R. 58), "the Executive Order is a pronouncement by the President that in his judgment it is advisable in the interest of the national security under present circumstances that no employee be retained unless his retention is clearly consistent with the interests of the national security. That is a rational and reasonable position. It is fully within the terms of the statute * * *." [14]

3. P. L. 733 does not purport to divest the President of his constitutional and statutory

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[14] Petitioner also argues that since the President's standard applies to all employees, the Order precludes the exercise of any discretion on the part of the agency head in applying the definition to sensitive and non-sensitive jobs (Pet. Br. 35–37). This contention is footless. Sections 3 and 8 (a) of the Order (Appendix, *infra*, pp. 6a–7a, 9a–11a) clearly recognize that the nature of the position is one factor which may be taken into consideration in determining whether an employee's retention is clearly consistent with the interests of national security. Similarly, Sections 2 and 3 of the regulations of the Department of Health, Education, and Welfare provide that that factor is to be considered—depending on the nature of the derogatory information—in determining whether continued employment is clearly consistent with the interests of national security. See Bureau of National Affairs, *Government Security and Loyalty*, pp. 15 : 561–15 : 563. See also *infra*, p. 61, n. 22.

power to guide his subordinates in the construction and administration of that Act.—As we see it, the real question before the Court is not whether the President has adopted a "more onerous" standard of what is "necessary or advisable in the interest of the national security", but whether the President is completely without power to adopt any criterion and to direct his agency and department heads to be guided by that test in exercising their statutory discretion, in order that "all persons * * * employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures" (Preamble of Executive Order 10450, Appendix, *infra*, pp. 4a–5a). The answer to this inquiry was succinctly given by the court below (R. 58–59):

> * * * In the first place, this is an executive matter and, if Congress had meant to prohibit the President from acting in respect to it, a serious question as to the validity of its act would arise. As we have already said, the Constitution vests the executive power in the President. In the second place, Congress knew, or must be conclusively presumed to have known, that subordinate officers in the executive branch of the Government act under the direction of the President, and it must have had that fact in mind when it conferred discretion upon these agency heads in this statute. Such an understanding is implicit in the

enactment. In the third place, Cole's argument in its ultimate essence is that the action of the agency head in the case at bar was void; thus the argument amounts to a contention that action by a subordinate is void if, having authority to act, he follows a policy and program laid down by a superior. That position is untenable on its face. The President surely has the right to lay down the lines within which his subordinates shall exercise discretions confided in them, and their operation within such lines is valid, not void. Perhaps, if a subordinate refused to follow the Presidential declaration or directive under such circumstances, other problems might be presented, but we have none such here.

(a). This answer, we submit, is inescapable "The Constitution confers on the President the 'executive Power', Art II, § 1, cl. 1, and imposes on him the duty to 'take Care that the Laws be faithfully executed.' Art. II, § 3." *Ex parte Quirin,* 317 U. S. 1, 26. "But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any

express limitation respecting removals,"[15] that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible." *Myers* v. *United States*, 272 U.S. 52, 117.

It is obvious, moreover, that the President can not always adequately discharge his constitutional duty merely by removing *post facto* an officer who has not intelligently or wisely exercised the powers vested in him. The duty to "'take Care that the Laws be faithfully executed'" may require the President to guide his subordinates in the performance of their functions. The same conclusion is implicit in the constitutional provision that the heads of the executive departments are subject to being called upon by the President for their "Opinion, in writing, * * * upon any Subject relating to the Duties of their respective Offices" (Art. II, § 2), a requirement which indicates that each agency head is, as to the duties of his office, always subject to the President's control.

Admittedly, "[t]he degree of guidance in the discharge of their duties that the President may

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[15] Unlike "the grant of legislative power under Article 1 to Congress, which is limited to powers therein enumerated, * * * the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed * * *." *Myers* v. *United States*, 272 U. S. 52, 128 and at 118, 138.

exercise over executive officers varies with the character of their services as prescribed in the law under which they act." *Myers* v. *United States, supra,* at 132. Where the governing law enjoins a duty of a mere ministerial character, the President cannot forbid its execution. Cf. *Kendall* v. *United States,* 12 Pet. 524, 610–613. But where the duties of officers prescribed by statute are executive, the President "may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers* v. *United States, supra* at 135. And where the duties performed by his cabinet officers are those in which they act for him as his *alter ego*—the field "sometimes described as political" (*id.* at 132)—they "must do his will" since "the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it." *Id.* at 134. "In such cases they are exercising not their own but his discretion." *Id.* at 132.

In *Myers,* this Court held that Congress could not constitutionally restrict the President in the exercise of his "exclusive and illimitable power of removal" of "purely executive officers." *Humphrey's Ex'r* v. *United States,* 295 U. S.

602, 627–628. The necessary corollary of that ruling is that Congress cannot constitutionally divest the President of his power to guide his subordinates in the discharge of executive or political duties. Cf. *Mississippi* v. *Johnson*, 4 Wall. 475. To require executive officers to be independent of Presidential direction and yet subject to a plenary power of removal would be to sanction inefficient and arbitrary government. The inevitable possibility of dismissal for having failed to execute the laws and duties of their respective departments in a manner approved by the President "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Cf. *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C. A. 2).

Further, as a practical matter, it must be supposed that the President's subordinates would not knowingly depart from the policies laid down by him. Cf. *Humphrey's Ex'r* v. *United States*, 295 U. S. 602, 629. It would be incongruous for the President to have his will done by his subordinates in this way, and yet escape all censure and responsibility as if what is done were truly independent of his control. The framers of our Constitution saw this, and vested in the President full power to meet his responsibility to "take Care that the Laws be faithfully executed."

The force of this position is not lessened here because the instant statute, which does not prescribe mere ministerial duties, concerns the

tenure of inferior officers. Concededly, as incident to its legislative power under Art. II, § 2, to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, * * * or in the Heads of Departments," Congress may, to some extent, restrict the latter in the exercise of the power of removal. It does not follow, however, that Congress could draw to itself "the power to remove or the right to participate in the exercise of that power." *Myers* v. *United States, supra,* at 161. Since that power of removal is an executive power which can be exercised only by the executive, it must, as we have seen, be subject to Presidential control and guidance. The President's power and responsibility to "take Care that *the* Laws be faithfully executed" [emphasis added] necessarily includes all the laws, not just some of the laws. Cf. *In re Neagle,* 135 U. S. 1, 63–64. The desirability of "unitary and uniform execution of the laws" (*Myers* v. *United States, supra,* at 135) is certainly no less important in the field of executive personnel administration than it is elsewhere. Indeed, proper personnel administration goes to the heart of the President's ability to discharge his constitutional responsibility to carry out the laws. To paraphrase the statement of former Chief Justice Hughes, the power of the President to execute the laws is "the power to [do so] successfully." See *Hirabayashi* v. *United States,* 320 U. S. 81, 93.

(b). Accordingly, if Congress had meant to prohibit the President from acting in this respect under P. L. 733, a serious question as to the validity of that enactment would arise. We agree with the court below, however, that that problem is not here presented. Cf. *Ex parte Quirin*, 317 U. S. 1, 29, 47. "Congress knew, or must be conclusively presumed to have known, that subordinate officers in the executive branch of the Government act under the direction of the President, and it must have had that fact in mind when it conferred discretion upon these agency heads in this statute. Such an understanding is implicit in the enactment." (R. 59.)[16] This conclusion is strengthened by the fact that, as long ago as 1871, the Congress explicitly authorized the President "to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof * * * and establish regulations for the conduct of persons who may receive appointments in the civil service." R. S. 1753 (5 U. S. C. 631); see also the Civil Service Act of 1883 (22 Stat. 403, as amended, 5 U. S. C. 632 *et seq.*).[17]

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[16] "For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Ex'r v. United States*, 295 U. S. 602, 629.

[17] Both statutes are cited in the Preamble of Executive Order 10450 (Appendix, *infra*, p. 5a).

As we view this case, R. S. 1753 itself furnishes sufficient statutory authority for those portions of the Executive Order which petitioner challenges as unlawfully divesting agency heads of their discretion. Admittedly, P. L. 733 does authorize agency heads to terminate employment "notwithstanding the provisions of section 6 of the [Lloyd-LaFollette Act] or the provisions of any other law" when they deem it necessary or advisable in the interests of national security. But the laws thus made inapplicable in the discretion of the agency heads must be viewed as limited to Congressional enactments which would otherwise restrict the removal power, rather than to Presidential regulations under R. S. 1753 implementing the executive power of removal. Moreover, even assuming that P. L. 733 does authorize agency heads to disregard Presidential regulations in their discretion, the Act certainly does not repeal the power of the President to establish such regulations nor prohibit agency heads from following such regulations. As the court below pointed out (R. 59), petitioner's "argument amounts to a contention that action by a subordinate is void if, having authority to act, he follows a policy and program laid down by a superior. That position is untenable on its face. * * * Perhaps, if a subordinate refused to follow the Presidential declaration or directive under such circumstances, other problems might be presented, but we have none such here."

4. *Congress has ratified the issuance of Executive Order 10450.*—There is another reason why Executive Order 10450 should not be read as in conflict with P. L. 733. It is well settled that Congress may ratify acts which it might have authorized and give the force of law to official action unauthorized when taken. Cf. *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 301–302; *Hirabayashi* v. *United States*, 320 U. S. 81, 91. Hence, if Congress has confirmed and ratified the action of the Chief Executive, the absence of legislative sanction for the Executive Order at the time of its issuance is immaterial.[18] That Congress did, in fact, accept and ratify the President's action is shown by a series of events subsequent to the issuance of the Order.[19]

[18] This part of the brief is immediately directed to the question whether the Order unlawfully divests agency heads of the discretion vested in them by P. L. 733, but the discussion with respect to Congressional ratification of the Order is also pertinent to the primary question whether P. L. 733 authorizes the President to extend its provisions to non-sensitive positions in non-sensitive agencies. See *supra*, pp. 20–42.

[19] Petitioner argues (Pet. Reply 5) that these events cannot supplant the contemporaneous intent of the Congress which enacted P. L. 733, citing such cases as *Fogarty* v. *United States*, 340 U. S. 8, 14. But we do not rely upon these later events as aids in the construction of P. L. 733; we refer to them as evidence of subsequent Congressional ratification of executive action.

Prior to the enactment of P. L. 733 in August 1950, Congress had attacked the problem of employee security by piecemeal legislation. As noted above, p. 25, the Army, Navy, and Coast Guard were given summary dismissal power by the Act of December 17, 1942 (56 Stat. 1053). The same power was later given to the Secretary of Defense by Section 630 of the Act of October 29, 1949 (63 Stat. 987). In 1946, the first so-called McCarran rider was attached to the Department of State Appropriation Act, 1947 (Act of July 5, 1946, 60 Stat. 458), authorizing the Secretary of State to terminate the employment of any employee when he deemed it "necessary or advisable in the interests of the United States." The two Defense Department statutes and the then current McCarran rider (Section 104 of the Act of July 20, 1949, 63 Stat. 447, 456) were expressly repealed by Section 4 of P. L. 733 (Appendix, *infra*, p. 4a). The following month, however, the McCarran rider was reenacted for the State Department and its provisions were also extended to the Department of Commerce. See General Appropriation Act, 1951, approved September 6, 1950, 64 Stat. 595, 768, § 1213. These riders again appeared in the Department of State Appropriation Act, 1952 (65 Stat. 581, § 103), 1953 (66 Stat. 555, § 103) and in the Department

of Commerce Appropriation Act, 1952 (65 Stat. 594, § 304), 1953 (66 Stat. 567, § 304).[20]

Shortly after the issuance of Executive Order 10450 in April 1953, the 1954 Appropriation Acts for the Departments of State, Commerce, and Justice came before the Congress. As reported out by the House Committee on Appropriations, the State and Commerce Department bills contained the usual dismissal rider and a similar provision had been inserted for the first time in the Justice Department bill. The riders were subjected to extensive discussion in the House and the Senate. See 99 Cong. Rec. 4511–4514, 4518–4523, 4524–4525, 4527–4529, 4534–4537, 4538, 4540, 4541, 4542–4543, 5818–5828, 5833–5835, 5986–5990. During the course of debate in the House, the full texts of both P. L. 733 and Executive Order 10450 were inserted in the Congressional Record. See 99 Cong. Rec. 4519–4523. After comprehensive debate, the riders were eliminated, it being the sense of the Congress that the Executive Order, properly promulgated under

[20] These various provisions for summary dismissal in the complete discretion of the agency head had the effect of making the requirements of the Lloyd-La Follette and Veterans Preference Acts inapplicable to those particular agencies, so long as the summary dismissal provisions remained in effect. Cf. *Myers* v. *Hollister*, (226 F. 2d 346 (C. A. D. C.), pending on petition for a writ of certiorari, No. 637, this Term; *Schey* v. *Weeks*, C. A. D. C., No. 12827, decided January 19, 1956.

P. L. 733, adequately covered the field and afforded employees proper protection.

The action thus taken by Congress was more than mere silent acquiescence in a well-publicized Presidential Order. Congressional rejection of the appropriation riders was a conscious choice of policy: Congress affirmatively expressed its will to accept the Order as the prevailing regulation. Cf. *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, 53. Further evidence of ratification is found in the fact that Congress thereafter appropriated funds for the Federal Bureau of Investigation and the Civil Service Commission to conduct their investigations under Sections 3 (a), 8 (c), 8 (d), and 9 of the Executive Order.[21] As

[21] Although the Appropriations Acts for 1955 and 1956 for the Department of Justice and the Civil Service Commission are in lump sums without allocation for this specific purpose, the allocations do appear in the testimony of agency representatives at the hearings on the bills. See *e. g.*, Hearings before the House Subcommittee on Appropriations, 83d Cong., 2d sess., on Department of Justice Appropriations for 1955, pp. 164–165; Hearings before the House Subcommittee on Appropriations, 84th Cong., 1st sess., on Department of Justice Appropriations for 1956, pp. 168–169; Hearings before the House Subcommittee on Appropriations, 83d Cong., 2d sess., on Independent Offices Appropriations for 1955, Part I, pp. 950–952, 960, 979–980, 986–999, 1008–1017; Hearings before the House Subcommittee on Appropriations, 84th Cong., 1st sess., on Independent Offices Appropriations for 1956, Part I, pp. 553, 561, 582–588, 591–594, 606, 637–638. As to the Civil Service Commission, it should be noted that the appropriations are for "national agency checks." Insofar as "full field investigations" are concerned, funds are obtained from a revolving fund established in 1952 (5 U. S. C. 657).

this Court has announced, "the appropriation by Congress of funds for the use of such agencies stands as confirmation and ratification of the action of the Chief Executive." *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Ludecke* v. *Watkins*, 335 U. S. 160, 173, n. 19; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116, 119.[22]

[22] Petitioner contends (Pet. Reply 6) that this evidence of Congressional ratification is entitled to no weight because representatives of the Executive branch have supposedly informed Congressional Committees that P. L. 733 and the Executive Order are not used to discharge a loyal employee holding a non-sensitive position in a non-sensitive agency. In particular, petitioner points to the testimony of Philip Young, Chairman of the Civil Service Committee, and Assistant Attorney General William F. Tompkins during the Hearings before the Senate Subcommittee on Reorganization of the Committee on Government Operations, 84th Cong., 1st sess., on S. J. Res. 21. But Mr. Young expressly stated that it was certainly conceivable to him to have "a position which would fall for adjudication under Executive Order 10450, section 8 (a), which was classified by the head of the agency as nonsensitive and yet which could have a direct relationship to the national security." *Id.* at 530. A fair reading of Mr. Tompkins' testimony discloses that he was referring only to individuals in non-sensitive positions against whom there was derogatory information relating to suitability rather than to loyalty or security. (Compare Section 2 of the Security Program Regulations of the Department of Health, Education, and Welfare, Bureau of National Affairs, *Government Security and Loyalty*, p. 15; 561). Any misunderstanding in the minds of the Committee was subsequently dissipated by Mr. Tompkins' later letter in which he expressly stated that (*id.* at 141):

"* * * Obviously, the Executive order is applicable to virtually all civilian employees of the executive branch of the Federal Government and, since the effective date of the

C. PETITIONER CANNOT CHALLENGE HIS DISMISSAL ON THE GROUND THAT IT WAS NOT IN THE INTEREST OF THE NATIONAL SECURITY

In addition to his basic contentions that Congress did not intend P. L. 733 to apply to employees such as he, and that Executive Order 10450 conflicts with the Act, petitioner also appears to argue that his removal was invalid as not actually necessary or advisable in the interest of the national security (Pet. Br. 30–34).

Insofar as the claim is that it was not necessary in the interest of the national security for the President to extend P. L. 733 to the Department of Health, Education, and Welfare, we have already answered that that is not a matter of judicial cognizance (see *supra*, pp. 22–23).

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order, Public Law 733 has likewise been applicable to all such employees. As I emphasized in my testimony, the final decision in any personnel security case rests by law on the head of the agency or department concerned.

"The law and the Executive order require him to determine whether the employment or continued employment of each employee of the Department or agency is clarly [sic] consistent with the interests of national security. The sensitivity of the employee's position and the nature of the derogatory information are two of the factors which the head of the Department or agency takes into account in making his determination."

Petitioner also adverts (Pet. 15; Pet. Br. 18) to pages 59–60 of the Hearings where Mr. Tompkins, according to petitioner, informed the Committee that the President has no power to coordinate the actions of his subordinates under P. L. 733. But all that Mr. Tompkins meant was that the President has no power to change the procedural steps leading to dismissal which P. L. 733 prescribed; the Order, of course, did not purport to change those procedures.

The alternative claim that Secretary Hobby erred in determining that petitioner's employment should be terminated as not in the interests of the national security is also not reviewable on this record. There is no showing or allegation—aside from the general assertion that a loyal person in a non-sensitive position cannot be a "security risk" (discussed below)—that the Secretary acted on grounds so unrelated to the national security that her action must be termed arbitrary or capricious. In these circumstances, the issue is identical to the oft-repeated claim in removal cases that discharge would not in fact promote the good of the service; and it has been repeatedly held that the courts will not inquire into the merits of an administrative determination of what constitutes cause for discharge, at least in the absence of a showing of arbitrary or capricious action plainly unconnected with the good or efficiency of the federal service. *E. g., Eberlein* v. *United States,* 257 U. S. 82; *Keim* v. *United States,* 177 U. S. 290; *Williams* v. *Cravens,* 210 F. 2d 874 (C. A. D. C.), certiorari denied, 348 U. S. 819; *Carter* v. *Forrestal,* 175 F. 2d 364 (C. A. D. C.), certiorari denied, 338 U. S. 832. The courts have so ruled where the governing statutes prescribed an apparently objective basis for removal, *i. e.*, that no civil service or preference eligible employee shall be discharged "except for such cause as will promote the efficiency of the service" (5 U. S. C. 652, 863). Accordingly, this principle is *a fortiori* applicable

here where the statute provides for termination in the discretion of the agency head and makes his decision final and conclusive. Cf. *Weinstein* v. *United States*, 109 C. Cls. 579.

Nor is there any merit to the contention (Pet. Br. 30–1, 32) that the Court should hold, as a matter of law, that the dismissal of a loyal employee in a non-sensitive position *cannot* be in the interest of the national security. The charges against petitioner concerned close association with Communists and with an organization asserted to be subversive (R. 16–17). In the present posture of the case, petitioner cannot and does not attack those charges, or some of them, as the basis for his discharge.[23] And it seems plain that retention of even a loyal employee, not in a policy position and without access to classified information, may be inconsistent with the demands of the national security if he continues a close association with subversive persons or organizations. Information which should not be known to Communists, even though unclassified, may be transmitted in good faith or inadvertently; as the Petrov episode in Australia indicates, a loyal employee in close contact with subversives may be used, unknown to himself, as a dupe or pawn; continued propagandization from close associates (even though

[23] As the Statement shows (*supra*, pp. 5–6), petitioner did not make a timely effort to contest the charges within the Department of Health, Education, and Welfare. See also *infra*, pp. 71–73.

covert) may sow the seeds of disloyalty. All these factors, and others, show that the Secretary's determination in petitioner's case cannot be convicted of irrationality as a matter of law.

By the same token, P. L. 733 is not invalid because it permits a dismissal on such grounds. Congress could reasonably decide that the danger to the country's interests from the continued employment of persons like petitioner outweighs the immediate injury to the employee; the latter's interests are to be protected (aside from the procedural safeguards which are not involved in this case) by the provision contemplating possible reemployment (*supra*, pp. 34–35, 43–44; *infra*, pp. 3a–4a, 8a–9a). Unlike the state statute involved in *Wieman* v. *Updegraff*, 344 U. S. 183, P. L. 733, as applied to petitioner, does not stigmatize as *disloyal*, and therefore marked with a "badge of infamy", mere innocent membership in alleged subversive groups. As applied here, the Act provides for the removal on "security" and not "loyalty" grounds of an employee whose retention, though he may be loyal, is reasonably believed to be detrimental to the national security because of his close and sympathetic association with Communists which he asserts he will continue (R. 19; see *supra*, pp. 4–6, *infra*, pp. 71–72).[24]

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[24] Petitioner also relies on *Ex parte Endo*, 323 U. S. 283 (Pet. Br. 30), but obviously the present dismissal Act is far different from the provision for internment of Americans of Japanese descent in a War Relocation Center.

II

PETITIONER WAS FURNISHED "A WRITTEN STATEMENT OF THE DECISION OF THE AGENCY HEAD" WITHIN THE MEANING OF P. L. 733

Petitioner's final contention is that, assuming that P. L. 733, as extended by the Executive Order, authorized the Secretary to terminate his employment, his discharge was unlawful for failure to comply with a procedural requirement of that Act. The argument is that the provision in Section 1 of P. L. 733 that the employee be furnished "a written statement of the decision of the agency head" means a statement of the reasons for the result, rather than a statement of the ultimate determination made by the agency head (Pet. Br. 48–51). Here again, petitioner seeks to read something into the Act which Congress did not say. Congress did not use the word "reasons", it used "decision"; and there is nothing in the legislative history of the Act which suggests that Congress intended "decision" to mean "reasons." Moreover, petitioner was fairly apprised of the reasons for his removal.

A. To buttress his argument, petitioner resorts to such cases as *Mulligan* v. *Andrews*, 211 F. 2d 28 (C. A. D. C.), and *Blackmar* v. *United States*, 120 F. Supp. 408 (C. Cls.), which hold that an employee is entitled to a statement of the reasons for his dismissal under the Lloyd-LaFollette and Veterans' Preference Acts. But P. L. 733 ex-

pressly makes those statutes inapplicable, and their terms are markedly different in this respect from those of P. L. 733. Section 6 of the Lloyd-LaFollette Act (5 U. S. C. 652) provides in pertinent part that "no person in the classified civil service of the United States shall be *removed* or suspended without pay therefrom *except* * * * *for reasons given in writing.* Any person whose removal or suspension without pay is sought shall (1) have *notice* of the same and *of any charges* preferred against him; (2) be furnished *a copy of such charges;* * * * and (4) [after filing an answer] be furnished at the earliest practicable date with a *written decision* on such answer. * * * *Copies of the charges,* the notice of hearing, the answer, *the reasons for removal* or suspension without pay, and the *order of removal* or suspension without pay shall be made a part of the records of the proper department or agency, * * *." (Emphasis added.) From the several terms employed, it is apparent that even in the Lloyd-LaFollette Act "decision" does not mean "reasons." The Act plainly draws a distinction between "charges," "decision" and "reasons for removal", but requires that all three be furnished employees.

Although Section 14 of the Veterans' Preference Act (Appendix, *infra,* pp. 17a-18a) does not employ the word "charges," it too draws the same distinction between "charges," "decision," and "reasons for removal". It provides that "no permanent or indefinite preference eligible * * * shall

be *discharged* * * * *except* * * * *for reasons given in writing*, and the person whose discharge * * * is sought shall have at least thirty days' advance written notice * * * stating any and all *reasons*, specifically and in detail, *for any such proposed action*; such preference eligible shall be allowed a reasonable time for answering the same * * * and shall have the right to appeal to the Civil Service Commission from an adverse *decision of the administrative officer* * * *; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its *findings and recommendations* to the proper administrative officer and shall send copies of the same to the appellant * * *." (Emphasis added.) Thus, like the Lloyd-LaFollette Act, the Veterans' Preference Act also requires that employees be furnished "reasons * * * for any such proposed action" (*i. e.*, charges), a "decision", and "reasons given in writing" for discharge. The distinction between "decision" and "reasons" is further emphasized by the requirement that, on appeal, the Civil Service Commission make "findings," *i. e.*, the reasons for removal, and "recommendations," *i. e.*, the decision.

In sharp contrast, P. L. 733 does not state that an employee shall be furnished with the "reasons" for his removal. It provides only that an employee shall be given (Appendix, *infra*, pp. 2a–3a) "(1) a written statement within thirty days after his suspension of the *charges* against

him * * * stated as specifically as security considerations permit * * * and (3) [after an opportunity to answer and be heard] a written statement of the *decision* of the agency head * * *." (Emphasis added.)[25]

Unless the unwarranted assumption be made that the language of these three Acts was chosen inadvertently, it must be concluded that Congress did not intend that employees be furnished more than a statement of the ultimate determination reached by the agency head under P. L. 733. We think it not without significance that the Civil Service Commission, the expert administrative body in this field, has so construed the statutes. With respect to the Lloyd-LaFollette and Veterans' Preference Acts, the Commission's regulations provide that decisions thereunder must contain the reasons for the actions taken. See 5 C. F. R. 9.102; 5 C. F. R. 22.10. As to P. L. 733, however, the Commission's instructions to agency hearing boards direct that "[t]he decision will not contain the reasons upon which the board

[25] It should also be observed in this connection that petitioner's reliance on Section 8 (b) of the Administrative Procedure Act (5 U. S. C. 1007 (b)) is misplaced. Petitioner cites that section as supposedly illustrative of Congressional usage of the term "decision" as meaning "reasons" (Pet. Br. 50). In fact, however, as is true in the Lloyd-LaFollette and Veterans' Preference Acts, Section 8 (b) of the Administrative Procedure Act expressly specifies that "[a]ll decisions * * * shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, * * *." Significantly, Congress did not so specify in P. L. 733.

based its conclusion. A separate *Memorandum of Reasons* will be prepared for that purpose." See Bureau of National Affairs, *Government Security and Loyalty*, p. 15:583. The instructions further state that "[a]ll decisions, favorable or unfavorable, will be in the language of the Security Standard provided by Executive Order 10450. Suggested language for the decision is: 'It is the decision of this Security Hearing Board that the employment of (Mr., Miss, or Mrs.—full name of individual) is (or, is not) clearly consistent with the interests of national security.'" *Id.* at p. 15:584.

While the legislative history of P. L. 733 offers no explanation why Congress did not require that employees be given the reasons for their removal, one may safely attribute the absence of any such provision to Congressional awareness that security considerations would frequently preclude furnishing an employee with a specific and detailed exposition of the reasons warranting dismissal. Thus, unlike the Veterans' Preference Act which requires that "any and all" charges be stated "specifically and in detail," P. L. 733 provides that the charges "shall be stated as specifically as security considerations permit." The same factors which moved Congress to make that provision as to charges probably led to the requirement that only the "decision" and not the "reasons" be stated in writing.

B. Assuming, however, that P. L. 733 requires something more than a mere statement of the determination by the agency head that employment should be terminated, there has been "substantial compliance" (*Williams* v. *Cravens*, 210 F. 2d 874, 876 (C. A. D. C.), certiorari denied, 348 U. S. 819) in this case. Fairly read, the Secretary's letter fully apprised petitioner of the basis upon which the determination rested. Specific reference was made to the letter of the Under Secretary, to the statement of charges, and to the sections of the Executive Order upon which the charges were based. Reference was likewise made to petitioner's reply, to his refusal to offer any explanation "regarding the associations carried on in your private life," and to his statement that he intended to continue "* * * to associate with any persons or groups of persons whom you see fit to choose." The letter then stated that the Secretary's conclusion was "[b]ased on a study of all the documents in your case, including your reply to reference letter * * *." (R. 21.)

In the light of petitioner's refusal to request a hearing, it is clear that the Secretary need not give him a more elaborate or detailed statement of the "reasons" for his dismissal than she did. Nothing had been added to the case for or against petitioner since the charges were issued. Petitioner does not here complain of the suffi-

ciency of the statement of charges,[26] and it must be presumed that the charges were "stated as specifically as security considerations permit," as the Act required. The Secretary consequently need do no more in furnishing the statement of her decision than to refer again to the charges.

Petitioner further objects that the Secretary did not in so many words make a determination that his discharge was "necessary or advisable in the interest of the national security" (Pet. Br. 46, 48, n. 23). This objection is specious. Plainly, P. L. 733 does not require agency heads to employ a talismanic formula in effecting discharges. The Secretary's letter states that "* * * it has been determined that your continued employment in the Department of Health, Education, and Welfare is not clearly consistent with the interests of national security. Therefore, your termination has been ordered effective at the close of business January 20, 1954." (R. 21.) In view of the President's finding in Execu-

[26] In requesting reopening of his case, petitioner's attorney contended that the charges were insufficiently stated (R. 30). This contention was apparently abandoned on petitioner's attempted appeal to the Civil Service Commission (R. 8–9). Similarly, the complaint filed in the District Court does not allege that petitioner's discharge was invalid for want of adequate charges (R. 10–11). In any event, such a contention would be without merit since the charges are in fact sufficiently specific and the degree of specificity of charges under the Act is a wholly discretionary matter. Cf. *Bailey v. Richardson*, 182 F. 2d 46, 52 (C. A. D. C.), affirmed by an equally divided court, 341 U. S. 918.

tive Order 10450 that national security requires that no employee be retained unless his employment is clearly consistent with the interest of national security, the Secretary's determination that petitioner's continued employment was not clearly consistent with the interest of national security, followed by her termination of his employment, obviously constituted a determination that his discharge was "necessary or advisable in the interest of the national security." See *supra*, pp. 45–48.

That the necessary determination was made is further shown by the Secretary's regulations which state that, pursuant to the authority vested in her by P. L. 733 and the Executive Order, "[i]t shall be the policy of the Department * * * to employ and to retain in employment only those persons whose employment or retention in employment is found to be clearly consistent with the interests of the national security" (Sec. 2), and that "[n]o person shall be employed, or retained as an employee, in this Department unless the employment of such person is clearly consistent with the interests of the national security" (Sec. 3 (a)). See Bureau of National Affairs, *op. cit. supra* at pp. 15:561, 15:562. Having thus defined in the regulations what she deemed to be "necessary or advisable in the interest of the national security" with respect to all employees of the Department, the Secretary's finding in any individual case that

continued employment is not clearly consistent with the interests of national security necessarily incorporates the determination that discharge is "necessary or advisable in the interests of the national security."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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